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No. 957

In the Supreme Court of the United States

OCTOBER TERM, 1961

ROBERT SOBLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 55a) is reported at 301 F. 2d 236.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1962. On April 13, 1962, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including May 12, 1962. The petition for writ of certiorari was filed on May 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conspiracy charged in Count 1 was barred by the statute of limitations and, if so, whether the submission to the jury of Count 1 was prejudicial.

2. Whether the admission of evidence concerning events antedating the conspiracy and events occurring during the later stages of the conspiracy was reversible error.

3. Whether the evidence was sufficient to show that the purpose of the conspiracy was to obtain and transmit information related to the national defense.

4. Whether the trial court properly denied petitioner's motion for a new trial based on newly discovered evidence.

STATUTES INVOLVED

Sections 793, 794, and 3282 of Title 18, U.S.C. and Section 19 of the Act of September 23, 1950, 64 Stat. 1005, appear at pages 69a–72a of the appendix to the petition.

STATEMENT

Petitioner was indicted on two counts, each of which charged him with conspiring to violate the espionage laws. Count 1 charged petitioner and various co-conspirators with conspiracy to violate 18 U.S.C. 793 (a) and (c), in that they agreed to obtain information concerning the national defense of the United States—specifically, information relating to the personnel and activities of the Office of Strategic Services and other government intelligence operations—with intent and reason to believe that the information obtained would be used to the advantage of the Soviet Union. Count 2 charged petitioner and

the same co-conspirators with conspiracy to violate 18 U.S.C. 794(a), in that they agreed to transmit to the Soviet Union information relating to the national defense of the United States with intent and reason to believe that the information would be used to the Soviet Union's advantage. The indictment alleged the same 25 overt acts to have been committed in furtherance of the conspiracy charged in each count.

Petitioner was convicted on both counts and sentenced to ten years' imprisonment on Count 1 and to life imprisonment on Count 2. Petitioner moved for a new trial on the basis of allegedly newly discovered evidence.

The district court, after conducting a hearing which took four days, denied the motion. On appeal, petitioner's conviction was affirmed.

The government's case was based primarily on the testimony of two witnesses, Jack Soble and Johanna Beker, each of whom conspired together with petitioner to obtain and transmit national defense information to the Soviet Union. The evidence adduced at trial may be summarized as follows:

Jack Soble and his brother Robert, the petitioner,[1] were born in Lithuania in the early 1900's, and went to Germany for their higher education. While in Germany they were active in the German Communist Party, but were expelled in 1929 for Trotskyite activities (R. 10–29).[2]

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[1] When Robert Soble was naturalized as a citizen in 1947, he added the letter "n" to his name, becoming Robert Soblen.

[2] "R." refers to the Appendix to the government's brief in the court of appeals, which is Volume II of the Record in this

In 1931, Jack Soble was summoned to the Soviet Embassy in Berlin where he was confronted by an agent of the Soviet Secret Police, then known as the GPU (later the NKVD). He was told that he must return to the Party in an undercover capacity and inform the Stalinists of Trotskyite activities. This he agreed to do (R. 30–34). When in 1933 all political activity outside the Nazi Party was prohibited in Germany, Jack Soble went to Russia and the petitioner returned to Lithuania (R. 35–36).

Near the end of 1939 Jack Soble was summoned to GPU headquarters, where he was brought before the head of the entire Soviet Secret Police, Lavrentia Beria. With Beria, along with other GPU officials, was Pjotr Fedotov, the chief of the Foreign Sector of the GPU, and Matusow, who had summoned him to GPU headquarters (R. 52–54). Beria, referring to petitioner by his old Party code name, "Roman," stated that the Soble brothers were known to the GPU as Communists. He said that Jack had worked for them abroad in the 30's and that petitioner was "an old standing Communist," a Trotskyite who had capitulated to the Party (R. 54a–55). Beria said that the GPU would like the Soble brothers to go abroad to gather "any information of any value to the Soviet Union" (R. 55, 159, 160). Beria then told Jack Soble that if he and petitioner would go abroad to work for the GPU, all of their families including relatives and

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Court. "T. Tr." and "H. Tr." refer to the transcript of petitioner's trial and hearing on his motion for a new trial, respectively. "T. Ex." and "H. Ex." refer to the exhibits introduced at the trial and hearing.

parents, would be allowed to go with them, and offered to double any sum of money that Soble's father put in a business venture so that the brothers would have a cover for spying. Jack Soble agreed to the proposition (R. 55–59, 159–161).

At the time of the Beria meeting, petitioner was in Lithuania. It was decided at the meeting that two GPU agents would go there to contact him (R. 58). In June 1940, Jack Soble returned to Lithuania, where he was met by petitioner. Petitioner told Jack that he had been approached by two agents of the GPU, Matusow and Martynov. The agents had restated the proposition made to Jack in Moscow, repeating that the brothers would go abroad and gather "any information of any value for Russia" and that they would, at the proper time, be given contacts (R. 59–61).

While in Moscow, awaiting completion of travel arrangements, Jack and petitioner attended a party given for them by the GPU. Fedotov repeated Beria's previous instructions that wherever the Sobles landed they should gather any information of any value to Russia, and instructed them that when they landed abroad, for example, in the United States, they should contact Amtorg, the Russian trade agency, through which they would be able to make contact with GPU agents (R. 73). On October 20, 1941, the two Soble brothers reached the United States, landing at San Francisco (R. 75–77).

Johanna Beker was born in Germany in 1911, the daughter of a Communist member of the German Reichstag (R. 199–200, 236). Having moved to Mos-

cow, she was approached in 1937 by the NKVD and asked to report to them concerning the activities and gossip of foreigners she knew. For almost two years, up until the time she emigrated to the United States, she continued to submit such reports (R. 201–208). In late 1938, she met, under NKVD instructions, Vassili M. Zubilin and his wife (R. 208–210).

Arriving in New York in August 1939, Mrs. Beker soon was contacted by "Johnny," *i.e.*, Mikhail Chaliapin, who had diplomatic status in the Soviet consulate (R. 214; T. Ex. 3, p. 142). Chaliapin questioned Mrs. Beker about various American acquaintances and asked her to prepare written reports for him. Thereafter, she met Chaliapin regularly and gave him reports, for which she was paid about thirty or forty dollars a month (R. 212–215). Beginning in late 1942, Mrs. Beker began to submit her reports to Mrs. Zubilin, receiving the same compensation given her by Chaliapin (R. 216–219). Zubilin was at that time Third Secretary of the Soviet Embassy in Washington (T. Ex. 141).

At this time, petitioner was living in New York. Jack Soble had moved his family from Montreal to New York in about the spring of 1942, at the direction of Zubilin (R. 82–86). Petitioner agreed to a meeting, at which Jack introduced petitioner to Zubilin. The next day petitioner told his brother that Zubilin had reminded him that he was in the United States in order to work for the Soviet Union. Thereafter, petitioner told Jack on several occasions that he was meeting Mrs. Zubilin (R. 88–89, 95). For his reports, petitioner was paid $100 to $150 a month (Pet. App. 56a).

Jack Soble met with Zubilin over a period of months after moving to New York, and then, early in 1943, Zubilin told Jack that another man, Chaliapin, would be his new contact. Chaliapin and Zubilin told Jack that he (Jack) would act as an intermediary between Chaliapin and an "old agent of the Russians who worked for them in Europe" (R. 92–93) and was now working among Trotskyite groups in America. Chaliapin introduced Jack Soble to "Mark" or "Etienne," whose real name was Mark Zborowski. Thereafter, Jack Soble continued to meet Zborowski and in turn to meet with Chaliapin (R. 90–103).

Early in 1943, Mrs. Zubilin told Jack Soble that she was petitioner's superior just as Chaliapin was Jack's superior. She said that she had given petitioner the names of a group of women who worked in the Office of Strategic Services (O.S.S.) and that through him she was getting information from this group (R. 103–105).

The O.S.S. was created June 13, 1942, by a military order signed by President Roosevelt, which provided that the O.S.S. should perform the following duties (T. Ex. 200):

> a. Collect and analyze such strategic information as may be required by the United States Joint Chiefs of Staff.
>
> b. Plan and operate such special services as may be directed by the United States Joint Chiefs of Staff.

The O.S.S. operated pursuant to this directive from its creation until it was dissolved in September 1945.

The activities of the O.S.S. and the names of its personnel (excepting the top echelon) were all considered classified matter, not available to the general public (R. 253–257).

In 1943 and 1944, petitioner and Jack Soble had various conversations concerning their work for the Soviet Union. Jack referred to his work in the Trotskyite field, and petitioner in turn told Jack that his job was to gather information through a group of people who worked in O.S.S. (R. 108–109).

One day in 1943, Jack Soble met with Zubilin, his wife, and Chaliapin. Mrs. Zubilin told Jack that petitioner would soon get a new contact because she (Mrs. Zubilin) was busy in other matters. The new contact was to be Chaliapin's wife.[3] Mrs. Zubilin also said that when this happened, they would make things even easier for petitioner by bringing in another person as a liaison between the group in O.S.S. and him. At this same meeting, Mrs. Zubilin said to Jack Soble that while petitioner transmitted to her all the material he gathered from the group in O.S.S., his comments were dry and short.

In late 1942 or early 1943, Mrs. Zubilin introduced Mrs. Beker to petitioner, whom Mrs. Zubilin said would be Mrs. Beker's new contact (R. 219–220). Mrs. Beker continued to see petitioner regularly, to submit reports to him and to receive her previous compensation—thirty or forty dollars a month—which was now given to her by petitioner (R. 220–221).

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[3] The indictment refers to Chaliapin's wife by her true name, Zoia Miakotina.

One day petitioner asked Mrs. Beker to meet Horst Baerensprung at a particular cafeteria. He described the man's physical appearance to her and how he would be dressed, that he would know Mrs. Beker's name, and that he would give her material which she was to give to petitioner (R. 221–222). Mrs. Beker met Baerensprung and he gave her an envelope containing typewritten reports. The reports concerned meetings of groups of German refugees living in the United States, and their plans for affiliation with the Communist Party and work in Germany after Hitler's defeat (R. 223). Petitioner also asked Mrs. Beker to met Hans Hirschfeld. Again a meeting place was arranged and the man was described by looks, apparel, and other details. Carrying out petitioner's instructions, Mrs. Beker met Hirschfeld and received an envelope of reports. These reports were biographical sketches of Germans and a report on German groups. This material, like the material received from Baerensprung, was delivered to petitioner (R. 223–226).

Mrs. Beker continued to meet Hirschfeld and Baerensprung from 1943 until early 1945. During this period the two men regularly gave her reports which she turned over to petitioner. Petitioner regularly gave her money to give to them (R. 226–227). According to O.S.S. personnel records, Baerensprung entered on duty for O.S.S. on June 15, 1943, as a part-time consultant and Hirschfeld became a consultant on October 8, 1943, receiving a salary of $350 per month (T. Ex. 196, 197, 199). When his services were terminated on July 31, 1945, Hirschfeld acknowl-

edged in writing his prior agreement "to keep forever secret the employment and all information obtained by reason thereof" (T. Ex. 198). Hirschfeld's reports were mainly from or about his office; he reported on interviews by some of his co-workers in O.S.S. with Germans, the latter's political leanings, and groupings that had formed among them. At times the reports named people working for O.S.S. and described their activities (R. 229–236). In the spring of 1945, the final paragraph of the last two or three reports stated that Hirschfeld had learned that the United States was working in the northwest United States on an important military project which would decide the war and was making great progress on it (R. 232–233).

In the late spring or early summer of 1945, petitioner instructed Mrs. Beker not to make any further appointments with Baerenspring or Hirschfeld. He said that she should not meet with them any longer because of events appearing in the newspapers at the time, especially those concerning the *Amerasia* case (R. 233). That case involved a leak of highly classified O.S.S. documents, which were found in the possession of the magazine *Amerasia* in the spring of 1945 (R. 259–260).

While petitioner was dealing with Mrs. Beker, his brother had received several new contacts for his work for the Soviet Union, including Boris Morros, Lucy Booker, and Floyd Miller[1] (R. 117–120, 165–

[1] Miller, testifying for the government at petitioner's trial, stated that he worked for Jack Soble in 1944, reporting on Trotskyite activities; that in early 1945 he received a new con-

171). Petitioner likewise had a number of contacts besides Mrs. Beker, including Beatrice Spitz and, after Jack Soble was instructed to turn his contacts over to his brother, Lucy Booker and Floyd Miller. These instructions were given Jack by Stephan Choudenko, who became his and petitioner's superior in late summer or early fall of 1944 (R. 105–106, 120–125).

In the spring of 1947, petitioner told Mrs. Beker that if at any time in the future she should be asked how she met him, she should say that he had been a friend of her brother's in their student years in Berlin, and that they had accidentally met on the streets in New York. None of this was true (R. 234).

Jack Soble made trips to Moscow in 1947, 1948, and 1949 (R. 130, 136, 138). On the 1947 trip, he met the two Zubilins and Fedotov (who had been at his 1940 meeting with Beria (R. 130)). They stated to Jack that they would welcome petitioner in Russia whenever he wanted to come and enlisted Jack's services in assisting Jacob Albam, a GPU agent, in falsifying an application for a tourist's visa to the United States (R. 131–133).

Jack Soble's passport had expired in 1952 and he had been unable to secure a new one. Petitioner advised Jack that it would be a good idea if he (Jack) would leave the country and reside in Europe. He advised him to obtain a lawyer and try to discover why he could not get a new passport—whether the FBI had found out about him or whether it was a formality (R. 145, 148).

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tact, petitioner, to whom he reported his attempts to get a newspaper job in Europe as a cover for espionage (R. 184–196).

In 1954 Jack Soble again met with Boris Morros, giving him letters to transmit to the Soviet Union. Included was a list of five or six names of Jack's contacts who worked for the Soviet Union. This list included Jacob Albam (under his code name "Bělova") and petitioner (under the code name "Roman") (R. 138–139).[5]

ARGUMENT

Petitioner was convicted on the basis of uncontradicted evidence. The thrust of his defense was, instead of offering any witnesses in his behalf, to attempt to bring out on cross-examination of government witnesses that any information petitioner gave the Soviets was not related to the national defense and that any such activities ceased in 1945. Under the trial court's charge (see R. 289–290, 301), the jury necessarily rejected this contention in convicting petitioner. The trial court, after a lengthy four-day hearing on petitioner's motion for a new trial, delivered an exhaustive opinion finding that the government had not suppressed evidence and that petitioner had not produced new evidence justifying a new trial. The court of appeals thoroughly examined petitioner's contentions and unanimously affirmed his conviction. We submit that there is no occasion for review.

1. Petitioner contends (Pet. 28–31) that prosecution of the conspiracy to obtain national defense in-

[5] Jack Soble, his wife, and Jacob Albam were indicted for conspiracy to commit espionage in January 1957. They pleaded guilty (R. 148–149). At the time of petitioner's trial, Jack Soble was still serving a prison term.

formation, charged in Count 1 of the indictment, was barred by the statute of limitations and that submission of this count to the jury was prejudicial error, which also affected petitioner's conviction on Count 2.

First, we submit, Count 1 was not barred by the statute of limitations. The trial court properly instructed the jury, without objection by petitioner, that in order to convict on Count 1 they must find that an overt act had been committed in pursuance of the conspiracy while petitioner was still a member after November 29, 1950 (R. 300–303). The jury's finding that such an overt act had occurred is supported by evidence showing: (1) that in 1952 petitioner advised his brother, whom he knew to be a Soviet agent and co-conspirator, to leave the United States apparently to escape detection (R. 145, 148, 302); (2) that in 1954 Jack Soble met with Boris Morros, another Soviet agent and co-conspirator, and gave Morros a list of names, apparently espionage contacts, including petitioner's code name, for transmission to the Soviet Union (R. 138–139, 302).

In any event, since petitioner was given concurrent sentences on both counts, it is well established that his conviction must be upheld if either count is valid. *E.g., Barenblatt* v. *United States*, 360 U.S. 109, 115; *Abrams* v. *United States*, 250 U.S. 616, 619; *Pierce* v. *United States*, 252 U.S. 239. There was admittedly no statute of limitations applicable to Count 2.

Moreover, there is not the slightest possibility that the evidence as to Count 1, assuming *arguendo* that that count should not have gone to the jury, could have resulted in any prejudice to petitioner. As the court

below held, petitioner "has pointed out no proof with respect to count 1 which was not equally admissible with respect to count 2 * * *. The obtaining of information for the U.S.S.R. (the conspiracy charged in count 1) was a necessary prerequisite to transmitting it (the conspiracy charged in count 2)"[6] (Pet. App. 58a).

2. Petitioner contends (Pet. 20–25) that it was prejudicial error to admit hearsay testimony relating to his own and his co-conspirators' pre-1940 and post-1945 activities. The testimony challenged is that given by co-conspirators Jack Soble, Floyd Miller, and Johanna Beker, concerning activities by them and petitioner on behalf of either the Soviet Union or the Communist Party prior to 1940 (the date the indictment charged the conspiracy started) and subsequent to 1945 (R. 123–131).

The admission of testimony concerning events which ante-date the crime is a matter for the trial court's discretion. *United States* v. *Dennis*, 183 F. 2d 201, 231 (C.A. 2), affirmed, 341 U.S. 494. The courts have upheld the introduction of evidence of this sort to show the probability that a defendant knew of the conspiracy and knowingly helped it (*Heike* v. *United States*, 227 U.S. 131, 145); the connection between future co-conspirators (*United States* v. *Crosby*,

[6] Petitioner seizes (Pet. 29–30) upon a single piece of evidence which he says was "presumably" admitted only with respect to Count 1 since it could not bear upon the charge in Count 2. That testimony, however, regarding the information about an important military project, bears upon material which the indictment charged petitioner with conspiring both to obtain and to transmit.

294 F. 2d 928, 946 (C.A. 2)); the manner in which the conspiracy came into being and its *modus operandi* (*United States v. Witt*, 215 F. 2d 580, 583 (C.A. 2), certiorari denied *sub nom. Talanker v. United States*, 348 U.S. 887); and the defendants' long-established purpose and intent (*Hodgskin v. United States*, 279 Fed. 85, 92 (C.A. 2)). And recently in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 69, this Court upheld the pertinency of evidence concerning events twenty or thirty years before to the current character of the Communist Party.

Here, the trial court admitted testimony concerning pre-1940 activities on similar grounds (R. 248–249):

> The basic reason for the admissibility of such evidence is that the Government is entitled to show the intent of the defendant and his alleged co-conspirators, the motive of the defendant and his alleged co-conspirators, and the alleged co-conspirators' community of interest and community of objectives.

When instructing (R. 15–16, 20) and charging the jury (R. 295–296), the court stressed the limited purpose for which this evidence was received, and twice in the charge cautioned the jury to avoid prejudice arising out of petitioner's pre-1940 Communist Party membership in Europe (R. 296–309). The court of appeals was clearly correct in holding that the "evidence was relevant background to the prosecution's case, to show the motivation and community of interest of the conspirators" and that there was no abuse of discretion in its admission (Pet. App. 59a).

Petitioner's attack on the admissibility of the post-1945 activities is based upon his contention that the conspiracy ended in 1945. We have seen above (pp. 11–12, 13), however, that ample evidence supported the jury's conclusion that the conspiracy continued after 1945. The trial court charged that the statements and declarations of co-conspirators could be attributed to petitioner if "made in furtherance of the conspiracy and *during the existence thereof*" (R. 287; emphasis added). As stated by the court below, "Since the jury must have found that the conspiracy continued past 1945 before it could consider the allegedly prejudicial testimony, to admit it was not error" (Pet. App. 61a).

3. Petitioner argues (Pet. 25–28) that the evidence against him was not sufficient to sustain the verdict, in that it did not show that the conspiracy was related to the procurement and transmission of information connected with the national defense. Petitioner seems not to challenge the adequacy of the evidence which established an agreement among the co-conspirators and proved his activities pursuant to that agreement, but only the evidence from which the jury inferred the "national defense" character of the information he obtained and transmitted. The court of appeals found, however, that the testimony of Mrs. Beker alone was sufficient to support the jury's finding (Pet. App. 57a). And in its totality, including the testimony of several other witnesses, the evidence is more than sufficient.

Beria and the Sobles agreed that the latter would "go abroad to work for us to gather any informa-

tion of any value to the Soviet Union" (R. 55). Clearly, this unlimited agreement included American national defense information since the record shows that the contemplated espionage activities were aimed especially at the United States (R. 56, 159–160, 73).

As to the activities performed pursuant to this agreement, the record leaves no doubt that petitioner obtained information from the Office of Strategic Services through Johanna Beker. Mrs. Beker testified that petitioner directed her to meet with Hans Hirschfeld, telling her that Hirschfeld worked for the O.S.S. (R. 223–224, 228); that, under petitioner's instructions, she received from Hirschfeld between 1943 and 1945 for transmittal to petitioner reports of interviews between O.S.S. employees and Germans, which named the O.S.S. employees involved (R. 228–233); that in 1945 the last reports given her by Hirschfeld concerned an important military project in northwest United States (R. 232). Mrs. Beker's testimony is corroborated by petitioner's admissions to his brother Jack during 1943 and 1944 that "his job was to gather information through a group of people who work in the O.S.S." (R. 108).

Even on petitioner's unsupported hypothesis that the only O.S.S. information available to Hirschfeld and Baerensprung, another of petitioner's O.S.S. contacts, was taken from public documents, the names of O.S.S. employees and the very fact that O.S.S., the United States' wartime military intelligence agency, was compiling dossiers on various Germans and German groups were themselves defense informa-

tion.[7] A high O.S.S. official testified that the names of O.S.S. personnel (excepting the top echelon), the "nature of their work, the substance of their work, the activities in which their unit was engaged" were not publicly available (R. 254–257). Thus, this case is markedly unlike *United States* v. *Heine*, 151 F. 2d 813 (C.A. 2), certiorari denied, 328 U.S. 833, in which Judge Learned Hand wrote that the statute is not offended by traffic in "information which the [armed] services have never thought it necessary to withhold at all" (*id.* at 816). Here, in contrast, the O.S.S. activities involved were carefully guarded secrets.

4. Petitioner moved in the district court for a new trial on the ground that his trial counsel were not aware of certain exculpatory facts of which, he claims, the prosecution should have informed them before or during trial. He urged that a new trial was required both in the interests of justice and on the ground of newly discovered evidence. After conducting a lengthy hearing, the district court denied the motion.

a. Petitioner asserts as newly discovered evidence the fact that Hans Hirschfeld had denied, prior to trial, Mrs. Beker's trial testimony that from 1943 until 1945 she had transmitted to petitioner from Hirschfeld information which Hirschfeld had obtained

[7] In *Gorin* v. *United States*, 312 U.S. 19, 23, the Court held that the obtaining and delivering of similar reports concerning the movements on the west coast of Japanese officials and of particular private citizens of interest to Naval Intelligence violated the predecessor statute to that involved in this case. The Court said this information would be useful to a foreign government as indicating the scope of American intelligence activities and allowing it to follow American intelligence agents. *Id.* at 29.

as a result of his position with the O.S.S. This denial was not discovered by his counsel, petitioner claims, because the government withheld from them (1) statements by Mrs. Beker describing her confrontation of Hirschfeld in the presence of F.B.I. agents and his denials of her accusations; (2) information concerning Hirschfeld's whereabouts at the time of trial; and (3) Hirschfeld's grand jury testimony concerning the confrontation.

All three of petitioner's contentions that the government suppressed evidence are without merit. First, the trial court ordered the government at petitioner's trial to produce three statements by Mrs. Beker describing the confrontation between Hirschfeld and herself (T. Ex. 169, 177, 188). Contrary to petitioner's contention, the trial court found, on the basis of evidence adduced at the motion for a new trial, that the statements had been turned over to defense counsel, including the portions of statements relative to the confrontation between Hirschfeld and Mrs. Beker (Pet. App. 7a–8a, 15a). Second, as the trial court also found in denying the motion for a new trial (Pet. App. 22a–24a), defense counsel did not attempt at any time during the trial to ascertain from the government where Hirschfeld was living and did not ask for additional time to obtain this information even though the importance of Hirschfeld as a witness was clear throughout the trial. Moreover, petitioner had no difficulty in locating Hirschfeld, who is a prominent West German citizen, soon after the trial had ended (Pet. App. 25a). Third, the transcript of Hirschfeld's grand jury testimony would not have been producible since Hirschfeld

was not a government witness. Indeed, petitioner made no request for the transcript at the trial.

b. Petitioner claims (Pet. 17, 19–20) that the government knew that other persons employed with Hirschfeld in the New York Biographical Records Unit of the O.S.S. had contradicted Mrs. Beker's testimony that Hirschfeld had secured information about the existence of a military project from his office.

The former O.S.S. employees who testified at the hearing on the motion for a new trial testified in substance, as petitioner says, that the "Biographical Records Unit had no access whatever to secret material or material of a military nature, and Dr. Hirschfeld's work in the Biographical Records Unit was to collate data obtained from the newspapers and public library" (Pet. 20). The trial court found, however, that these witnesses were all readily available to the defense during the trial and that defense counsel had deliberately chose, as a matter of professional judgment and trial strategy, not to locate and call them (Pet. App. 36a). It is well settled that allegedly newly discovered evidence is not sufficient to require a new trial when it was available during the trial to a reasonably diligent defendant (*e.g.*, *United States* v. *Costello*, 255 F. 2d 876, 879–881 (C.A. 2), certiorari denied, 357 U.S. 937; *United States* v. *On Lee*, 201 F. 2d 722, 723–724 (C.A. 2), certiorari denied, 345 U.S. 936) and was deliberately omitted by the defense as a matter of trial strategy (*e.g.*, *United States* v. *Capece*, 287 F. 2d 537, 538 (C.A. 2); *United States* v. *Costello*, *supra*; *Delbridge* v. *United States*, 262 F. 2d 710, 712 (C.A. D.C.); *Palakiko* v. *Harper*, 209 F. 2d 75, 95 (C.A. 9), certiorari denied, 347 U.S. 956).

In any event, even if the O.S.S. witnesses really constituted newly discovered evidence, the testimony was not of such a nature as to warrant a new trial. Even assuming the employees of the Biographical Records Unit generally had no official access to classified information, that would not prove that Hirschfeld could not have obtained or did not obtain the information which Mrs. Beker testified that she had received. In addition, the role which petitioner suggests Hirschfeld played as an O.S.S. employee is belied by the description which he gave the F.B.I. of his O.S.S. activities. His admissions to the F.B.I. reflect that, while employed by the O.S.S., he made several trips to Washington, some for as long as ten days, for the purpose of apprising himself of the administrative and operational functions of the O.S.S. Washington office, and for reporting and consultation (H. Ex. K, p. 10); the O.S.S. office in which he worked in New York had armed guards on the floor; he had a key to the office and the combination to the safe in which material was kept during working hours (*id.* at 16); and he briefed Allen Dulles prior to the latter's undercover wartime mission to Switzerland (*id.* at 23). Since the testimony of the O.S.S. agents would almost certainly have had no effect on the trial, petitioner, under settled principles, was not entitled to a new trial. See *Mesarosh* v. *United States*, 352 U.S. 1, 9; *United States* v. *On Lee*, *supra*; *United States* v. *Rutkin*, 208 F. 2d 647, 654 (C.A. 3).

c. Petitioner also argues that the government suppressed the medical reports on Jack Soble, who, as a co-conspirator, testified to his brother's activities in the espionage ring. In particular, petitioner emphasizes

that the government suppressed the diagnosis given by Dr. Rinsley in testifying at the earlier trial of another member of the espionage ring in *United States* v. *Zborowski*. This evidence was neither suppressed, nor newly discovered by petitioner. Petitioner was thoroughly familiar with the central facts concerning Jack Soble's psychological history, and they were brought out at the trial. The trial court found that petitioner's counsel made a calculated decision to rely on petitioner's own knowledge of Jack Soble's mental condition and therefore not to examine medical reports or other information (Pet. App. 29a–30a). We submit that this finding is fully supported by the evidence.

Petitioner at no time during the trial requested from the government any medical reports on the witness, even though he knew of Jack Soble's psychiatric history, including his treatment in federal and state institutions. In fact, petitioner, who is a psychiatrist, recommended to the psychiatrist at the federal penitentiary at Springfield, Missouri, that his brother be given shock treatment (H. Ex. G [redacted], p. 3). In addition, petitioner's counsel knew that hospital and medical records could be subpoenaed (H. Tr. 147, 149–154, 229–231). Furthermore, petitioner's counsel made no effort to follow up the statement of government counsel at the trial that Jack Soble had testified earlier at the *Zborowski* trial and that this testimony was readily available (T. Tr. 508, 510–511).* Indeed,

* The judge cited at the trial in this case the court of appeals' reported opinion in *Zborowski* (271 F. 2d 661, 667) (C.A. 2), which specifically stated that defense counsel in that case had available, and extensively used on cross-examination, medical reports on Jack Soble at federal and state institutions (see Pet. App. 31a).

petitioner's counsel admitted that he intentionally refrained from reading Jack Soble's testimony at the other trial (H. Tr. 143–144, 156–158). This testimony would have identified most of the medical reports which petitioner later claimed were newly discovered evidence (*id.* at 143–144, 225–226, 228–229).

Petitioner's counsel thus did not pursue the obvious leads to further information concerning his brother's mental condition. Counsel specifically stated at the hearing on a motion for a new trial that the reason they did not pursue these leads was that they had made a deliberate decision to rely on the knowledge possessed by petitioner himself of his brother's mental condition (H. Tr. 139–140, 156, 228). Using this information, petitioner's counsel exhaustively cross-examined Jack Soble at the trial. Soble admitted that he had had a mental condition for several years; that he had deliberately swallowed nuts and bolts while confined in Lewisburg Penitentiary in 1958; that after suffering a breakdown in a New York jail, he had been sent in 1957 to Bellevue Hospital for psychiatric observation in order to determine his mental competence to plead to the espionage indictment against him; and that he had received twenty shock treatments in 1958 and 1959 in the federal penitentiary at Springfield, Missouri (T. Tr. 589–598). As a result of this cross-examination, defense counsel argued Jack Soble's mental condition to the jury in summation (T. Tr. 1509–1510, 1514), and the court charged the jury specifically on the issue raised by defense counsel's claim "that Jack Soble was utterly irresponsible, perjurious, and mentally incompetent" (T. Tr. 1609). The jury having, apparently, credited

Jack Soble's testimony despite his mental condition, petitioner cannot obtain a new trial because he desires to try a new strategy.

Petitioner, however, contends that, even though he had access to Jack Soble's medical records and deliberately decided not to use them, the government had an affirmative duty to disclose a medical diagnosis made of Soble in 1958. This diagnosis given by Dr. Donald B. Rinsley in testimony in *United States* v. *Zborowski* was that Soble had a "moderate to severe" mental illness, that he had a deficient memory, and that he is "at times * * * capable of filling in his gaps in memory with information which he believes to be true but which may not be true" (H. Ex. D, p. 914; H. Tr. 258, 261). We submit, however, that the government's obligation to be assured of the truth of the testimony it expected to elicit from Jack Soble was fully satisfied, and that therefore the government was justified in making the prosecutive judgment to present Jack Soble to the jury as a credible witness.

First, the record shows that, subsequent to Dr. Rinsley's diagnosis and before the trial, Jack Soble's mental condition was substantially improved and that he had been determined by psychiatrists to be a competent witness (H. Ex. E, V). Second, even aside from this later diagnosis of Soble's condition, Dr. Rinsley's own testimony would not have precluded the government from using Soble as a witness in this case. Dr. Rinsley's testimony in the *Zborowski* case was that Jack Soble was "capable" of fabricating rather than under a compulsion to fabricate, that this happens "at times" rather than always, and that this

capability asserted itself only when there were memory gaps rather than at random. The actual report which Dr. Rinsley made on Soble, from which he refreshed his recollection while testifying, does not mention Soble's capability to fabricate but it does state that Jack "revealed an excellent general fund of information, some impairment of recent memory, intact remote memory * * *" (H. Ex. G, p. 3). Dr. Rinsley further testified on direct examination in *Zborowski* that "probably the determination of whether anything he [Jack Soble] said was true or not true would have to rest upon essentially the same standards that you [defense counsel] might use or that the jury would have to use. * * * For any specific or particular statement I would have to say that I would not have any claim to making a better judgment [as to the truth or falsity of a statement] than you might or someone else might" (H. Tr. 259). Dr. Rinsley said that the jurors could "most definitely" determine whether Soble was telling the truth (H. Tr. 261–262). In short, while Jack Soble's mental history required that the government proceed with care in accepting his account of events, it did not require that the government decline to use him as a witness.

Once the government determined to use Soble as a witness, after comparing his story with other available information and deciding that his proposed testimony was accurate, there was no obligation to disclose any psychiatric report which cast some doubt on his accuracy. The cases cited by petitioner (Pet. 18–19) all concern the withholding of contradictory material facts or a contradictory witness, *i.e.*, exculpatory evi-

dence, or the positive misrepresentation of evidentiary facts. We know of no cases which hold that the government—with no person or facts contradicting the witness' story and with corroborative evidence giving good reason to credit it—must disclose all the information not in the nature of evidence, which might be useful for cross-examination. This is particularly true where, as in this case, the basic facts were all known to the defendant and his counsel and they deliberately chose not to pursue the information.[9]

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[9] Petitioner includes (Pet. 4) in his Questions Presented three issues which he does not argue: whether petitioner was deprived of his constitutional rights by denial of an adjournment upon the entry of newly-retained counsel into the case, by denial of his motion to take the case off the calendar on the ground that he was not able physically to stand trial, and by denial of his request for an adjournment so that he might decide whether to testify in his own behalf. Not one of these issues was raised in the court below. In addition, all are completely without merit since in all these instances, the district court properly exercised its discretion.

1. The morning that trial was scheduled to start, July 19, 1961, Joseph Brill entered an appearance and stated to the court that he had been retained as petitioner's trial counsel that morning. Petitioner had been represented by Jacob Friedman since December 22, 1960, shortly after his arraignment. The court denied Mr. Brill's request for a delay in the trial, since it was petitioner who had been pressing for an early trial and since Mr. Friedman was remaining to assist Mr. Brill (T. Tr. 2-11).

2. On June 15 and 16, 1961, the district court held an extensive hearing on petitioner's ability to stand trial. (We have obtained from the court reporter and lodged with this Court a certified transcript of this hearing and the eleven exhibits received, since, as the petition notes, this transcript is missing from the files of the district court.) Prior to June 15, petitioner had been insistent on going to trial. His attorneys stated on May 29, in response to the Assistant United States Attorney's request for a medical examination, that petitioner was willing to go on trial regardless of a physician's findings. (Proceedings

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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of May 29, 1961, p. 4). At the June hearing, the government offered testimony from a hematologist who had examined petitioner on March 1 (Ex. 3), and June 12 (Ex. 4), 1961, the director of a health center which had employed petitioner in a limited capacity from May 18 to June 12, 1961, and an expert in pharmacology; petitioner likewise testified at the hearing (Proceedings of June 15 and 16, 1961, pp. 16–174). Upon this evidence, the district court ruled that petitioner was able, physically and mentally, to stand trial (*id.* 175–181).

3. The government notified the defense shortly after 10:30 a.m. on July 10 that the government expected to rest "in a day or two" (T. Tr. 1361). The government rested a day later (T. Tr. 1426). After an hour was spent in the argument of motions, the court granted a recess to permit defense counsel to formulate their plans (T. Tr. 1465). Defense counsel returned from this recess to ask the court for an overnight adjournment so that petitioner might decide whether or not to take the stand. The court refused to grant an adjournment of that length, but permitted petitioner and his counsel a further and unlimited opportunity at that time to arrive at a decision. When they returned from their discussion, defense counsel stated that petitioner, although protesting that he had not received sufficient time to decide, would not take the stand (T. Tr. 1466–1471). Counsel then volunteered for the record that they had recommended this decision to petitioner and that they felt that the court had "granted a great deal of courtesy to the defendant" (T. Tr. 1475).